



OGC 78-2447

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OGC Has Reviewed

MEMORANDUM FOR: Director, National Foreign Assessment Center  
Director, National Intelligence Tasking Center  
Deputy to DCI for Resource Management  
Deputy Director for Science and Technology  
Deputy Director for Operations  
Deputy Director for Administration

FROM: Anthony A. Lapham  
General Counsel

SUBJECT: Anti-Disclosure Agreements

1. It has come to my attention that an increasing number of corporations in the private sector are requiring Agency personnel to sign anti-disclosure agreements prior to conducting any business or briefings. It has been the advice of this Office that our personnel not sign such anti-disclosure agreements before this Office has had a chance to review the agreement and advise the concerned individual. To better explain our position, I have chosen to make a comparative analysis of two such agreements which I feel characteristically represent the main issues presented Agency personnel required to sign such documents--the [ ] agreement (which we find acceptable) and the [ ] agreement (which we find non-acceptable).

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2. Background: During the course of their official duties, Agency personnel often receive proprietary information or trade secrets of the proposed contractor or private corporation. This information does not normally have either patent or copyright protection. Such information was developed at the private expense of the contractor, and its commercial value to the contractor may far exceed the price paid by the Agency for its use. Recognizing this and attempting to encourage full disclosure of contractor equipment or facility capabilities to Agency personnel, the Government usually includes clauses or procedures into the contract requiring

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the Agency to protect such information and not permit its disclosure to unauthorized parties. Agency failure to properly safeguard such information may result in depriving the contractors of their property rights, and may expose to potentially large liability as well as extremely costly and extended lawsuits.

3. The Law: Among the relevant criminal statutes of the United States Code, the following is noted:

Title 18, section 1905 which prohibits disclosure of confidential information (proprietary or trade secret) "to any extent not authorized by law . . . coming to him in the course of his employment or official duties . . . ." This section provides for fine, imprisonment or both, and for discharge from employment.

4. General Commercial Practice: Generally, any Government employee who discloses such confidential information to unauthorized parties, either during or after his employment, exposes himself to personal civil liability and to potential criminal prosecution for such disclosure. Many companies, aware of the above prohibitions, still prefer to strengthen their position in case of unauthorized disclosure by requiring recipients of such confidential proprietary information to sign nondisclosure agreements binding all concerned parties to varying degrees of liability in the event of unauthorized disclosure.

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STATINTL 5. Analysis of [ ] Agreement: The [ ] agreement we find objectionable for the following reasons:

a. Preamble: The agreement attempts to bind not merely the Agency, but all of the United States of America as well.

b. Paragraph 1: All information received by Agency personnel is categorized as being proprietary in nature. Such an expansive definition of proprietary information and trade secrets is clearly questionable in light of court decisions in this area.

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c. Paragraph 2: The burden of proving innocence in any unauthorized disclosure falls on the Government. We see no reason to accept such a burden absent some compelling quid pro quo.

d. Paragraph 3: No [ ] personnel can receive information in confidence. If any Agency employee discloses such proprietary information to a [ ] employee, the Agency becomes liable for [ ] use of this information.

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e. Paragraph 4: The exact termination date of this agreement is at best vague, at worst perpetual.

f. Paragraph 7: We agree to be bound by the laws of California in construing the provisions of this agreement. The trade secret laws of California are very strong and carry severe penalties for unauthorized disclosure.

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6. Analysis of [ ] Agreement: The [ ] nondisclosure agreement, on the other hand, is acceptable. Our reasoning is based on these facts:

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a. The parties to this agreement are limited to a specific agency and meeting.

b. The disclosed information is clearly delineated by subject areas. It would be preferable to actually announce each piece of proprietary data during the disclosure as such, but limiting such information to specific areas is better than [ ] all inclusive definition.

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c. The purpose of disclosure is stated in the agreement. This is, in effect, a license to use such information for such purposes.

d. No burden of proof automatically falls on the Government in case of an unauthorized disclosure.

e. The agreement terminates automatically three years after signing.

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7. In sum then, we find nondisclosure agreements similar to that employed by [ ] to be acceptable, while the type of agreement incorporating restrictions like those in the [ ] agreement are not. Our decision is based on the fact that [ ]-like agreements follow those restrictions imposed on Agency personnel by law, while [ ]-like ones attempt to bind the Agency and its personnel to limitations far in excess of those provided by law. Unless some essential, necessary gain is to be realized from the specifically sought information, we suggest that our personnel not sign [ ]-like agreements before this Office has had a chance to review and advise the concerned individual.

8. Accordingly, I suggest that appropriate measures be undertaken by each Directorate to insure that individuals who may be presented with anti-disclosure agreements be made aware of the necessity of seeking legal review and advice prior to their signing such agreements. If any questions arise concerning anti-disclosure agreements, please contact this Office.

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[ ]

Anthony A. Lapham

Attachments:

[ ] Disclosure Agreements

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